Unique Splendid Holdings Sdn Bhd v Tshai Fook Cheung @ Chai Fook Chong & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-380–11 OF 2016
AZIZUL AZMI ADNAN J
24 OCTOBER 2017

Civil Procedure — Striking out — Application to strike out plaintiff's claim — Plaintiff brought action against defendants as legal and beneficial owners of shares in company — Defendants applied to strike out plaintiff's claim — Whether company ought to be complainant for claim of falsified transaction — Whether company ought to be defendant in claim for friendly loan — Whether issuance of shares in company in breach of ss 67 and 132D of the Companies Act 1965 — Rules of Court 2012 O18 r 19(1)

Companies and Corporations — Shares — Shareholders — Action against legal and beneficial owners of shares — Whether company ought to be complainant for claim of falsified transaction existed — Whether company ought to be defendant in claim for friendly loan established — Whether issuance of shares in company in breach of ss 67 and 132D of the Companies Act 1965 — Companies Act 1965 ss 67 & 132D

The 12 defendants were the legal and beneficial owners of more than 95% of the issued and paid up share capital in Pacific Engineering Sdn Bhd ('the company'). The plaintiff claimed that prior to entering into share sale agreement ('the SSA'), the plaintiff was invited to invest in the company, for the purposes of which it was allowed to observe the daily business operation of the company. The plaintiff then claimed a number of illegalities on the way of the business of the company had previously been conducted. The plaintiff, inter alia, discovered certain falsified transactions and accounting, by virtue of which the company was able to obtain loans and to draw down on credit facilities. The plaintiff further claimed that the plaintiff was not able to register itself as the proprietor of the 334,000 shares as the Companies Commission refused the registration. The plaintiff further submitted that the issuance of 650,000 shares in the company in 2013 was in breach of ss 67 and 132D of the Companies Act 1965 ('the Act'). The defendants then applied to strike out the plaintiff's action pursuant to O18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012.

Held, allowing the defendants application and striking out the plaintiff's claim:

(1) If three was falsified transactions and dubious accounting practices undertaken by the former management of the company, these would amount to a breach of the duties owed to the company. These duties were not owed to the shareholders of the company. Therefore, the proper complainant ought to be the company and not the plaintiff (see para 16).

(2) The plaintiff's claim in relation to the friendly loan disclosed no reasonable cause of action as the plaintiff had given the loan to the company and not to the defendants. The loan was given after the plaintiff had acquired control of the company following practical completion of the SSA. The proper defendant thus ought to have been the company (see para 17).

(3) Even if the 650,000 shares in the company had been issued in contravention of s 67 of the Act, such contravention would not render the shares to be illegal or void.Therefore, the relief claimed by the plaintiff ie for the 650,000 shares issued in 2013 to be declared 'invalidated and cancelled', could not be granted as there was no reasonable cause of action that would grant the relief prayed for. In addition, the plaintiff would be contractually constrained from making the claim as the plaintiff had specifically waived its right and remedies against the defendants by virtue of cl 1A.5 of the SSA as well as the more general provision contained in cl 4.5 (see paras 21 & 23–24).

(4) Section 132D(6) of the Act only created a cause of action in favour of the person to whom the shares had been issued or to the company itself. The plaintiff was not the person to whom the shares was initially issued. It had purchased the shares from the subscriber of such share, who were the defendants. As such, it would not be open to the plaintiff to claim under s 132D(6). In totality, the plaintiff's claim disclosed no reasonable cause of action (see paras 32 & 35–37).

[Bahasa Malaysia summary

Kedua belas defendan merupakan pemilik undang-undang dan faedah kepada 95% kepentingan saham dalam Pacific Engineering Sdn Bhd ('syarikat tersebut'). Plaintif membuat tuntutan sebelum memasuki perjanjian jualan saham ('perjanjian tersebut'), plaintif telah dipelawa untuk membuat pelaburan di dalam syarikat tersebut bertujuan untuk membenarkan plaintif meneliti operasi perniagaan syarikat tersebut. Plaintif kemudiannya membuat aduan mengenai pelanggaran undang-undang mengenai cara perniagaan syarikat tersebut beroperasi. Plaintif telah membongkar beberapa transaksi dan akaun yang dipalsukan di mana membolehkan syarikat tersebut mendapatkan pinjaman dan melakukan kemudahan kredit. Plaintif kemudiannya membuat tuntutan bahawa plaintif tidak boleh mendaftar sebagai pemegang saham kepada 334,000 saham setelah pendaftaran yang dibuat tidak dibenarkan oleh Suruhanjaya Syarikat. Plaintif kemudiannya berhujah bahawa 650,000

pegangan saham dalam syarikat tersebut pada 2013 adalah bertentangan dengan ss 67 dan 133D Akta Syarikat 1965 ('Akta tersebut'). Defendan kemudiannya membuat permohonan untuk mengenepikan tindakan plaintif di bawah A 18 k 19(1) (a), (b), (c) and (d) Kaedah Mahkamah 2012.

Diputuskan, membenarkan permohonan defendan dan mengenepikan tuntutan plaintif:

(1) Sekiranya terdapat transaksi yang dipalsukan dan amalan perakuanan yang mencurigakan dilakukan oleh pihak pengurusan terdahulu syarikat tersebut, ini merupakan pelanggaran tanggungjawab kepada syarikat. Tanggungjawab-tanggungjawab ini bukannya terletak pada pemegang saham syarikat tersebut. Justeru, pengadu sepatutnya adalah syarikat tersebut dan bukannya plaintif (lihat perenggan 16).

(2) Tuntutan plaintif berkaitan dengan pinjaman persahabatan bukan merupakan satu kausa tindakan kausa disebabkan plaintif yang telah memberi pinjaman tersebut dan bukannya defendan-defendan. Pinjaman tersebut diberi selepas plaintif mengurus tadbir syarikat tersebut setelah perjanjian tersebut dipenuhi secara praktikal. Defendan sepatutnya adalah syarikat tersebut (lihat perenggan 17).

(3) Sekalipun 650,000 saham dalam syarikat tersebut telah diisukan bertentangan dengan s 67 Akta tersebut, ianya tidak menyebabkan pegangan saham tersebut menjadi tidak sah dan menyalahi undang-undang. Justeru, relif yang dipohon plaintif untuk mengisytiharkan saham tersebut tidak sah dan dibatalkan, tidak boleh dipenuhi disebabkan tiada kausa tindakan yang munasabah untuk membenarkan tuntutam plaintif. Tambahan pula, plaintif dihalang untuk membuat tuntutan tersebut disebabkan plaintif telah melepasakan hak dan remedi terhadap defendan mengikut klausa 1A.5 dalam perjanjian tersebut dan mengikut klausa 4.5 yang menerangkan proviso secara amnya (lihat perenggan 21 & 23–24).

(4) Seksyen 132D Akta tersebut hanya memberi kausa tindakan kepada sesiapa yang diisukan pegangan saham atau kepada syarikat tersebut sendiri. Plaintif bukannya individu yang sebenarnya diisukan saham tersebut yang dibeli oleh pemilik yang lain, iaitu defendan-defendan. Justeru, plaintif dihalang untuk membuat tuntutan di bawah s 132D(6). Secara keseluruhan, tuntutan plaintif tidak menunjukkan kausa tindakan yang munasabah (lihat perenggan 32 & 35–37).]

Notes

For a case on application to strike out plaintiff's claim, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) para 9355.

For a case on shareholders, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) para 1233.

Cases referred to

Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors [1997] 4 MLJ 329, HC (refd)

Legislation referred to

Companies Act 1965 ss 67, 67(1), (6), 132D, 132D(1), (6), (7)
Contracts Act 1950 s 24
Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d)

Michael Choo (Melissa Chua with him) (NK Tan & Rahim) for the plaintiff.
Dennis Khong (Bernice Sew with him) (Zain & Co) for the defendant.

Azizul Azmi Adnan J:

INTRODUCTION

[1] The defendants in this action applied for the plaintiff's suit to be struck out, which application I allowed. These grounds of judgment record the reasons upon which this court allowed the striking out.

Background facts

[2] The 12 defendants were the legal and beneficial owners of more than 95% of the issued and paid-up share capital in Pacific Engineering Sdn Bhd, a company engaged in the manufacture of water heaters. This company is referred to in this judgment as 'PECOL' or the 'company'. By a share sale agreement dated 18 March 2015 ('the SSA'), the defendants sold their holdings in PECOL to the plaintiff, Unique Splendid Sdn Bhd. The remaining shares in PECOL (amounting to 4.57% of its issued share capital) were and are owned by a third party, and were not made the subject of the SSA.

[3] The plaintiff claimed that, prior to entering into the SSA, it was invited to invest in PECOL, for the purposes of which it was allowed to observe the daily business operations of PECOL.

[4] The SSA contained starkly limited representations and warranties with respect to the business of, or the shares in, PECOL. According to the plaintiff, 'practical completion' of the SSA took place on 29 October 2015, upon which the plaintiff took over the management and control of PECOL from the defendants.

[5] At the material time, PECOL was undergoing some financial difficulties. On 5 September 2016, the plaintiff gave a friendly loan of RM1.7m to PECOL. Of this amount, RM841,142.60 remains outstanding.

[6] The plaintiff claimed that, after having acquired the management and control over PECOL, it discovered a number of illegalities in, among others, the way that the business of PECOL had previously been conducted. These contentions may be summarised into the following:

(a) certain falsified transactions and accounting, by virtue of which PECOL was able to obtain loans and to draw down on credit facilities; and

(b) the issuance of 650,000 shares in PECOL in 2013 was illegal because the shareholders at the time did not subscribe for the shares with their own money, but had used funds of PECOL to do so, in contravention of s 67 of the Companies Act 1965. It will be recalled that s 67 prohibits a company from providing financial assistance for the purpose of or in connection with an acquisition of its own shares. Of these 650,000 shares, 620,286 were the subject matter of the SSA. (The SSA also recorded the sale and purchase of a further 334,000 shares, in respect of which there is no taint of any contention of illegality.)

[7] The plaintiff further claimed that, as a consequence of the actions of the defendants, the plaintiff was not able to register itself as the proprietor of the 334,000 shares as the Companies Commission has refused the registration of such shares. According to the plaintiff, this was because the 2014 and 2015 had not yet been finalised. This in turn was a consequence of the issuance of 650,000 shares in purported contravention of s 67.

[8] The plaintiff claimed the following substantive reliefs:

(a) a declaration that the 650,000 shares that had been issued in breach of s 67 be 'invalidated and cancelled';

(b) an order directing the Companies Commission to register the plaintiff as the proprietor of the 334,000 shares;

(c) an order directing the defendants to repay the sum of RM620,286 that had been paid by the plaintiff for the shares that had been issued in contravention of s 67 and which had been purchased by the plaintiff pursuant to the SSA;

(d) an order directing the defendants to repay to the plaintiff the sum of RM841,142.60, being the amount remaining outstanding under the friendly loan given by the plaintiff to PECOL; and

(e) damages in the amount of RM2m to compensate the plaintiff for its losses in keeping PECOL in operation.

[9] The defendants applied to strike out the whole of the plaintiff's action pursuant to O 18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012.

[10] The final observation I would make before leaving the background facts of this case is that the plaintiff did not seek to sue on the SSA. In the ordinary course of events, it would appear to be logical that, if shares that been purchased are subsequently discovered to be invalid or to have been unlawfully issued, the first recourse would be to sue on the sale and purchase agreement. However, the plaintiff did not do that here. An examination of the terms of the SSA will provide a clue as to why this was so.

[11] The sum total of the defendants' representation and warranties as vendors under the SSA are set out in cl 6.1:

> 6. Representations and Warranties
>
> 6.1 *Vendors' Representations and Warranties* — Save as otherwise provided in the Agreement and as disclosed to the Purchaser, the Vnedors warrant and represent to and undertakes with the Purchaser that the Sale SHares are absolutely and legally and/or beneficially owned by the Vendors free from Encumbrances and legal proceedings, and the Vendors have the unrestricted rights to transfer and/or in any way deal with the Sale Shares.

[12] As I had mentioned earlier, these representations and warranties are unusually scanty. More than just that, it also appears from cl 1A of the SSA that the circumstances surrounding the issuance of the 650,000 shares and the fact that there are outstanding queries from the Companies Commission have been disclosed to the plaintiff as purchaser. The plaintiff has nonetheless agreed not only to enter into the SSA to purchase the shares, but has also released the defendants (as vendors) from all liability arising in connection with the issuance of the 650,000 shares (see cl 1A.5), and had agreed to proceed to completion despite the fact that the share certificates for the subject shares could not be issued (see cl 1A.3).

[13] The provisions in cl 1A must be read in their entirety in order to appreciate their full scope and extent. Clause 1A of the SSA is reproduced in the annexure to this judgment.

ANALYSIS

[14] Instead of relying on the SSA (and it will be obvious from the above as to why no reliance was placed on SSA), the plaintiff based its causes of action upon, inter alia, the purported breaches by the defendants of certain statutory obligations under the Companies Act 1965.

[15] Before delving into these issues in detail, it will be convenient at this point to deal with the issues of the purported falsified transactions (referred to at para 6(a) above) and the friendly loan given by the plaintiff to PECOL.

The falsified transactions

[16] In the case of the purported falsified transactions, I am of the view that the proper complainant ought to be PECOL, and not the plaintiff here. If there had been falsified transactions and dubious accounting practices undertaken by the former management of the company, these would have amounted to a breach of the duties that they owed to the company. These duties are not owed to the shareholders of the company. Accordingly, I struck out the plaintiff's claim in connection with the purported falsified transaction on grounds that it disclosed no reasonable cause of action.

The friendly loan

[17] In relation to the friendly loan, the plaintiff had given the loan to PECOL, and not to the defendants. Not only that, but according to the plaintiff's own case, the loan had been given *after* the plaintiff had acquired control of the company following practical completion of the SSA. The proper defendant thus ought to have been PECOL, even leaving aside the fact that the plaintiff had acquired management control of PECOL by this time. Here again I struck out this portion of the plaintiff's claim for the reason that it disclosed no reasonable cause of action against the defendants.

[18] I now turn to the contentions that the issuance of the 650,000 shares had breached ss 67 and 132D of the Companies Act 1965.

Section 67 of the Companies Act 1965

[19] As part of the capital maintenance rule, s 67 prohibits a company from providing financial assistance for the purposes of or in connection with a purchase or subscription of its own shares. An officer of a company found to be in contravention of s 67(1) commits a criminal offence.

[20] Despite the fact that financial assistance is prohibited and despite the fact of the penal consequences that may flow from such act, s 67(6) permits the recovery of the amount of any money or security given as financial assistance. For ease of reference, s 67(6) is reproduced below:

> (6) Nothing in this section shall operate to prevent the company or any person from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable, either on account of any financial assistance given, or under any guarantee entered into or in respect of any security provided, in contravention of this section.

[21] The courts have consistently interpreted s 67(6) as excluding the effects

of s 24 of the Contracts Act 1950. Accordingly, even if the 650,000 shares in PECOL had been issued in contravention of s 67, such contravention would not render the shares to be illegal or void. For this proposition, a number of authorities was quoted by counsel for the defendant. It is only necessary for me to refer to one of them. In *Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors* [1997] 4 MLJ 329, it was held as follows:

> The transparent ratio to be discerned from the cases that I have anatomised is that a contract which is prohibited by statute does not become void and unenforceable if the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself. Section 24 cannot apply to such a contract for the obvious reason that the statute itself has saved the contract which was otherwise forbidden. As Gibbs ACJ observed in the passage from the *Yango* decision which I have reproduced in an earlier part of the judgment it is only in a rare situation in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable. Section 67 is one of the instances of such rare exercise of legislative power. I therefore hold that as s 67(3) prescribes penalties for a breach of s 67(1) and s 67(6) provides remedies for the breach and, furthermore, having regard to the context and purpose of s 67(1) any transaction entered into in breach of the section is valid and enforceable. In the circumstances the agreement in this case does not become void and unenforceable. The corollary is that the transaction entered into by the parties is valid and, in consequence thereof, the first defendant may enforce payment arising from the allotment of the shares for which it gave financial assistance. I pause to refer to the reliance of the plaintiff on *Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors* [1981] 2 MLJ 114; [1981] 1 LNS 89 and *Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Co* [1990] 3 MLJ 485 in support of his submission. My short answer to the two judgments is that in the case of the former no reference was made to s 67(6) while in the case of the latter only a brief reference was made to s 67(6) unlike the principle of law lucidly enunciated in *Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1995] 4 CLJ 300 which, in the circumstances, is more convincing. In the light of my conclusion it is unnecessary for me to consider whether the allotment of the shares can be validated under s 63 of the Companies Act 1965. Neither is it necessary for me to consider whether, on the facts of this case, the court should come to the aid of the plaintiff based on authorities such as *Sajan Singh v Sardara Ali* [1959] 1 LNS 90; *Tinsley v Milligan* [1993] 3 All ER 65; *Wai Hin Tin Mining Co Ltd v Lee Chow Beng* [1968] 2 MLJ 251; [1967] 1 LNS 204 and *Lee Chua (f) v Mustafa b Osman* [1966] 1 AMR 680 which was affirmed by the Court of Appeal (see [1966] 2 AMR 2566).
>
> Notwithstanding what I have said thus far I must point out that the declarations sought by the plaintiff are to render only the allotment of shares to the second defendant as void. My immediate response is that s 67(1) only prohibits the giving of financial assistance for the acquisition of shares and not the acquisition of the shares itself which is perfectly lawful unless there is evidence, of which there is none, that it was illegally allotted by, for example, not following the proper procedure. The allotment of shares to the second defendant is therefore not hit by s 67(1) and is thereby not invalidated in any way (see *Spink (Bournemouth) Ltd v Spink* [1936] 1 All ER 597; *EH Dey Pty Ltd (In Liquidation) v Dey* [1966] VR 464) without the

need to invoke s 67(6). This, however, is subject to an important qualification. As the allotment of shares in this case is connected with the financial assistance provided by the 1st defendant the activation of s 67(1) depends on whether both the transactions can be severed. If they can, then the transaction relating to the acquisition of shares does not come within s 67(1) (see *Carney v Herbert* [1985] AC 301). It is not necessary for me to decide whether the two transactions can be severed for two reasons: firstly, it was not argued before me; and, secondly, it is not relevant for obvious reasons as the result would be the same whether the transactions are severable or not. If they are severable the allotment of shares is valid as it is not prohibited by s 67(1). If they are not severable the composite transaction will be governed by s 67(6) and will still be valid.

[22] The quotation is reproduced in extenso to demonstrate the two applicable principles. The first is that, because of s 67(6), the rights and obligations under or arising out of the financial assistance itself are not extinguished. The second is that the issue and allotment of the shares in respect of which financial assistance had been given are not affected by the illegality of the financial assistance.

[23] It follows therefore that, even assuming that there had in fact been a breach of s 67(1), the relief claimed by the plaintiff — for the 650,000 shares issued in 2013 to be declared 'invalidated and cancelled' — cannot be granted. For this reason, the plaintiff's claim in connection with the breach of s 67 was struck out, as there was no reasonable cause of action that would grant the relief prayed for.

[24] Now, assuming for the moment that the plaintiff also seeks to recover the amount of the financial assistance that had purportedly been provided by PECOL to the defendants (s 67(6) of the Companies Act 1965 was amended by the Companies (Amendment) (No 2) Act 1992 to allow 'any person' to recover the amount of the financial assistance, as opposed to merely the company). Assume also that this point had been adequately pleaded (the roll-up prayer in para 51(f) of the plaintiff's statement of claim could be argued to cover this point). In my view, the plaintiff would still be contractually constrained from making that claim, for it has specifically waived its rights and remedies against the defendants by virtue of cl 1A.5 of the SSA as well as the more general provision contained in cl 4.5.

[25] Clause 1A.5 is reproduced below:

> 1A.5 *Release & Indemnity* — The Purchaser hereby fully, absolutely, unconditionally and irrevocably waives and releases all Claims, rights and/or remedies that the Purchaser may have and/or acquire against the Vendors and/or against the Vendors' nominee(s) to the Board of the Company, in respect of and/or in connection with the issuance of the Beneficial Shares, the updating of records with the

> CCM, the updating of the Register of Members and other books and/or company secretarial records of the Company, the non-issuance of the shares certificates in respect of the Beneficial Shares and compliance with all the relevant provisions of the Act and the relevant rules and/or regulations as may be required by the CCM, as stipulated in this Clause 1A. The Purchaser further hereby unconditionally and irrevocably agrees and undertakes with the Vendors to indemnify and hold the Vendors and/or the Vendors' nominee directors save and harmless from and against any and all damage, claim, liability or loss suffered, incurred or sustained by the Vendors and/or the Vendors' nominee directors, resulting from, arising out of or relating to the updating of records with the CCM, the Register of Members and other books and/or company secretarial records of the Company as well as compliance with all relevant provisions of the Act and the relevant rules and/or regulations as may be required by the CCM by the Purchaser upon Completion of this Agreement.

[26] From this clause, it can be seen that the plaintiff has waived all its rights and remedies in respect of or in connection with the issuance of the 650,000 shares, which are referred to in the SSA as the beneficial shares.

[27] It has also to be borne in mind that, although s 67(6) was amended in 1992 to allow 'any person' to recover the amount of financial assistance given, the identity of that person must relate in some way to the giving of the financial assistance or to any related guarantee or security. Thus if a bank had granted a loan to a purchaser to acquire shares in a company, but the company's assets were charged to the bank as security for the loan (resulting in contravention of s 67(1)), the bank would be entitled to recover the loan from the purchaser, despite the contravention of s 67(1). The bank, for the purposes of s 67(6), comes within the category of 'any person' envisaged by s 67(6). Section 67(6) does not permit a person who does not have any connection or nexus to the financial assistance, guarantee or security provided in contravention of s 67(1) to claim for recovery.

[28] For these reasons, any attempt by the plaintiff to claim for the return of the financial assistance would have no prospect of success. I accordingly struck out this claim under O 18 r 19(1)(b) of the Rules of Court 2012.

[29] I note for completeness that PECOL has not waived its right to claim for the return of the financial assistance (for it was not a party to the SSA). However, PECOL has not been included as a co-plaintiff in this action.

Section 132D of the Companies Act 1965

[30] The plaintiff claimed that the 650,000 shares in PECOL had been issued without a resolution having been passed by the company in general meeting, in contravention of s 132D(1) of the Companies Act 1965, which provided as follows:

> Section 132D Approval of company required for issue of shares by directors
>
> (1) Notwithstanding anything in a company's memorandum or articles, the directors shall not, without the prior approval of the company in general meeting, exercise any power of the company to issue shares.

[31] Learned counsel for the plaintiff argued that s 132D(6) and 132D(7) gave the plaintiff statutory causes of action against the directors of PECOL for a declaration that the issue of the 650,000 shares were void and for recovery of the RM620,286 that had been paid to the defendants for those portion of the shares that were affected by the failure to obtain the shareholders' resolution.

[32] In my view, s 132D(6) only created a cause of action in favour of the person to whom the shares had been issued, or to the company itself. A subsequent purchaser of those shares cannot avail itself of s 132D(6), based on the plain words of the provision. Similarly, s 132D(7) provided for the liability of a director who had knowingly contravened, or had permitted or authorised the contravention of s 132D. However, such liability is owed only to the company and to the person to whom the shares had been issued.

[33] The relevant sections are reproduced below:

> (6) Any issue of shares made by a company in contravention of this section shall be void and consideration given for the shares shall be recoverable accordingly.
>
> ...
>
> (7) Any director who knowingly contravenes, or permits or authorizes the contravention of, this section with respect to any issue of shares shall be liable to compensate the company and the person to whom the shares were issued for any loss, damages or costs which the company or that person may have sustained or incurred thereby; but no proceedings to recover any such loss, damages or costs shall be commenced, notwithstanding the provisions of the Limitation Act 1953, after the expiration of three years from the date of the issue.

[34] It will be seen that, although s 132D(6) does not expressly specify the identity of the person whom may avail himself or herself of this provision, the provision makes it clear that what is being rendered void is an *issue of shares*. This suggests that only a subscriber of such shares may obtain the benefit of this provision, and not a subsequent purchaser of the shares. The section goes on

further to state that the 'consideration given for the shares shall be recoverable'. This must necessarily mean the consideration given in connection with the issue of the shares. It is thus only the subscription price that may be recovered. No cause of action was created in favour of a person who may have subsequently purchased the shares. This subsequent purchaser's remedy lies in contract, against the vendor of such shares.

[35] The plaintiff in this case is not the person to whom the shares had been initially issued. It had purchased the shares from the subscriber of such shares, being the defendants. As such, it will not be open to the plaintiff to claim under s 132D(6).

[36] If s 132D(6) were not explicit about the identity of a claimant, then s 132D(7) makes it abundantly clear that liability is owed only to 'the company and the person to whom the shares were issued'. The shares in this case had not been issued to the plaintiff. They were issued to the defendants. The plaintiff subsequently purchased the shares from the defendants.

[37] For this reason, I was of the view that the plaintiff's claim did not disclose a reasonable cause of action in as far as it sought to claim recovery of the purchase price of RM620,286.

[38] Finally, in as far as the plaintiff's prayer to be recorded as the registered proprietor of the 334,000 shares (the validity of which were not in dispute), I was of the view that this was a matter that was entirely within the plaintiff's control, as it was by its own evidence in full control of the management and operations of PECOL.

SUMMARY

[39] The following summarises the findings and decision of this court:

(a) the proper complainant in connection with the purported falsified transactions ought to be PECOL, and not the plaintiff. As such, the plaintiff's claim in this regard disclosed no reasonable cause of action and was struck out pursuant to O 18 r 19(1)(a);

(b) the proper defendant in connection with the recovery of the amounts owed under the friendly loan was PECOL, and not the defendants. Therefore the plaintiff's claim relating to the friendly loan disclosed no reasonable cause of action against the defendants, and was struck out pursuant to O 18 r 19(1)(a);

(c) in connection with the purported breach of s 67(1) of the Companies Act 1965:

(i) even if there had been a breach of s 67(1) in connection with the issuance of the 650,000 shares, such breach would not render the shares invalid or void, and hence the declaratory relief sought by the plaintiff cannot be granted. The plaintiff's claim for declaratory relief was struck out pursuant to O 18 r 19(1)(a), as there was no reasonable cause of action that could have granted the relief prayed for;

(ii) the plaintiff would not be permitted to recover the amount of the financial assistance that had purportedly been provided by PECOL to the defendants, because it has specifically waived its rights and remedies against the defendants by virtue of the provisions of the SSA that it had entered with the defendants. This claim was therefore struck out under O 18 r 19(1)(b), as the claim was obviously unsustainable; and

(d) in connection with the purported breach of s 132D(1) of the Companies Act 1965, the plaintiff was not entitled to claim relief under s 132D(6) or 132D(7), as the plaintiff was not a person to whom the shares were initially issued but rather a subsequent purchaser of such shares. This claim was struck out under O 18 r 19(1)(a).

[40] It will be seen in this case that the plaintiff had entered into the purchase of the PECOL shares under SSA having had the full opportunity to extract warranties from the vendors. For whatever reason, it chose not to do so. Instead, it agreed to terms that effectively transferred to it the risks associated with the business and the subject shares, without contractual recourse to the vendors. Having made this bargain, it then sought to sue the vendors not on the SSA but on other, statutory, causes of action. It is trite law that it is not the function of the courts to save litigants from the bargain that they had themselves struck, no matter how unfair or one-sided that bargain may now seem, with the benefit of hindsight.

[41] I have made reference in this judgment to the SSA in order to better explain the factual circumstances of the case. However, in assessing the merits of the plaintiff's claim in connection with the application by the defendants to strike out the action under O 18 r 19(1)(a) of the Rules of Court 2012 (and my decision summarised at paras 39(a), 39(b), 39(c)(i) and 39(d) *ante*), I only took into account the pleadings in this case. It is only at paras 24 to 29 that I have taken into account the provisions of the SSA and the affidavit evidence, for the purposes of making a determination under O 18 r 19(1)(d) of the Rules of Court 2012.

[42] For the reasons explained in this judgment, I allowed the defendants' application and struck out the whole of the plaintiff's claim.

Annexure

1A. The Sale Shares

1A.1 **Registered Shares** – The Vendors are collectively the registered and beneficial owners the Registered Shares as set out opposite their respective names and in the respective proportions set out in Schedule 1.

1A.2 **The Beneficial Shares** - The Vendors hereby disclose and the Purchaser hereby acknowledges and agrees that:

(a) On or about 27.03.2013, the Vendors, as the shareholders of the Company, convened an extraordinary general meeting ("**EGM**") of the Company, wherein the Vendors had inter alia, pursuant to Section 132D of the Act, given the authority and approval to the directors of the Company to issue the Beneficial Shares to the Vendors as shareholders of the Company, as set out opposite their respective names and in the respective proportions set out in Schedule 1. Consequently, the directors of the Company had, on or about 27.03.2013, resolved, inter alia, to issue and allot the Beneficial Shares to the Vendors;

(b) Notwithstanding:

(i) the resolution for the issuance and/or allotment of the Beneficial Shares by the shareholders and directors of the Company as mentioned above;

(ii) the share capital funds for the Beneficial Shares being duly credited by the Vendors to the Company; and

(iii) the Form 24 dated 27.03.2013 in respect of the issuance and/or allotment of the Beneficial Shares being duly lodged with the Companies Commission of Malaysia ("**CCM**") on 24.11.2014,

the issuance of the Beneficial Shares and the corresponding increase in the paid-up share capital of the Company resulting there from have not to date been updated in the records of the CCM due to outstanding queries by the CCM in relation to previous filings by the Company with the CCM.

(c) In view of the foregoing, the official records of the CCM do not reflect the issuance of the Beneficial Shares and the corresponding increase in the paid-up share capital of the Company resulting from the issuance of the Beneficial Shares.

(d) Additionally, due to the outstanding queries by the CCM in relation to previous filings by the Company with the CCM:

(i) the Register of Members of the Company have not to date been maintained and/or updated to reflect the Vendors as collectively holding the Beneficial Shares and the paid-up share capital of the Company being RM1,000,000.00, as stipulated under Recital A; and

(ii) no share certificates have to date been issued in respect of the Beneficial Shares.

1A.3 **Purchase of all Sale Shares** – Notwithstanding the foregoing, and in particular, the outstanding filing with the CCM in respect of the Beneficial Shares and the corresponding increase in the paid-up share capital of the Company resulting from the issuance of the Beneficial Shares, as well as the non-updating of the Register of Members and the non-issuance of the share certificates in respect of the Beneficial Shares as stipulated above, the Purchaser hereby agrees to purchase the Sale Shares in its entirety and all references to 'the Vendors registered and beneficial ownership of the Sale Shares' and to all Ordinary Shares of the Company being 'deemed issued and fully paid up or deemed credited as fully paid up' under this Agreement shall be subject to the provisions of this Clause 1A and other terms and conditions contained herein.

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1A.4 **Updating of Records with the CCM** – The Vendors shall endeavour to ensure that the existing company secretary of the Company shall update all outstanding statutory records of the Company with the CCM, the Register of Members and other books and/or company secretarial records of the Company, at its own costs and expense, upon the execution of this Agreement. Notwithstanding, in the event the company secretary of the Company is unable, for any reason whatsoever, to complete the same prior to the Completion of this Agreement, then, notwithstanding anything in this Agreement, the Purchaser hereby unconditionally and irrevocably agrees to update all outstanding statutory records of the Company with the CCM, the Register of Members and other books and/or company secretarial records of the Company, at its own costs and expense, upon the Completion of this Agreement, including without limitation the records required to be updated or submissions required to be made with the CCM pursuant to the issuance of the Beneficial Shares and the corresponding increase in the paid-up share capital of the Company resulting from the issuance of the Beneficial Shares, and to comply with all relevant provisions of the Act and the relevant rules and/or regulations as may be required by the CCM.

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1A.5 **Release & Indemnity** - The Purchaser hereby fully, absolutely, unconditionally and irrevocably waives and releases all Claims, rights and/or remedies that the Purchaser may have and/or acquire against the Vendors and/or against the Vendors' nominee(s) to the Board of the Company, in respect of and/or in connection with the issuance of the Beneficial Shares, the updating of records with the CCM, the updating of the Register of Members and other books and/or company secretarial records of the Company, the non-issuance of the share certificates in respect of the Beneficial Shares and compliance with all relevant provisions of the Act and the relevant rules and/or regulations as may be required by the CCM, as stipulated in this Clause 1A. The Purchaser further hereby unconditionally and irrevocably agrees and undertakes with the Vendors to indemnify and hold the Vendors and/or the Vendors' nominee directors save and harmless from and against any and all damage, claim, liability or loss suffered, incurred or sustained by the Vendors and/or the Vendors' nominee directors, resulting from, arising out of or relating to the updating of records with the CCM, the Register of Members and other books and/or company secretarial records of the Company as well as compliance with all relevant provisions of the Act and the relevant rules and/or regulations as may be required by the CCM by the Purchaser upon Completion of this Agreement.

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F *Defendant's application allowed, and plaintiff's claim struck out.*

Reported by Mohd Kamarul Anwar

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